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In The

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK DEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON THE MERITS FOR RESPONDENT TELEPHONE COMPANY

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QUESTION PRESENTED

The one question decided below and presented here is whether a utility company is a "displaced person" within the meaning of the URA, (42 U.S.C. § 4601 *et seq.*) when it moves its utility lines from land which was formerly the bed of a public street but the absolute ownership of which, free from the public street easement, has been acquired by a local government agency for a federally-assisted urban renewal project, after which the company is not permitted by the acquiring agency to maintain and operate its facilities in the same location.

Petitioner's brief incorrectly describes the question presented as involving the removal of such lines "from public rights-of-way." No such question was presented to or decided by the courts below.

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STATUTE INVOLVED

FROM U.S.C. Title 42:

Section 4621:

The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Section 4622:

(a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after January 2, 1971, the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for—

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; * * *

Section 4601:

As used in this chapter—

(5) The term "person" means any individual, partnership, corporation or association.

(6) The term "displaced person" means any person who * * * moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property * * * for a program or project undertaken by a Federal agency, or with Federal financial assistance * * *

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily

* * *

(B) for the sale of services to the public;

* * *

Section 4637:

A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after January 2, 1971, as a direct result of any project or program which receives Federal financial assistance under title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the Demonstration Cities and Metropolitan Development Act of 1966 shall, for the purposes of this subchapter, be deemed to have been displaced as the result of the acquisition of real property.

Section 4630:

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he

receives satisfactory assurances from such State agency that—

(1) fair and reasonable payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title; * * *

Section 4631:

(c) Any grant to, or contract or agreement with, a State agency executed before January 2, 1971, under which Federal financial assistance is available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, shall be amended to include the cost of providing payments and services under sections 4630 and 4655 of this title. * * *

Section 4652

(a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put.

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at

the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the United States all his right, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interests in accordance with applicable law, other than this section.

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Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,[1]

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Petitioner's Statement of the Case includes reference to the fact that some of the relocated utility lines involved in C&P's claims were moved from land in conservation projects where "acquisition of land * * * was infrequent and

[1] A wholly owned subsidiary of American Telephone and Telegraph Company.

selective (Petitioner's Brief, p. 3)." This suggests that some of the relocations affected by the decisions of the courts below may have involved the removal of utility lines from land which had not been acquired by NRHA for redevelopment and use for purposes other than any further use by the general public as a street. This is not the case.

Although it is true that a few of the claims filed by C&P did include removal of some facilities from land in conservation projects, the proceedings below did not reach the point of determining whether or in which instances such land had been acquired by NRHA, or whether particular facilities moved from land not so acquired were moved as the result of the acquisition of other land on which C&P conducted its business activities. Also some of the claims included the cost of moving small portions of a telephone line from land which remained a public street, in cases where an entire line built wholly within one street had to be moved because the land in that street had been acquired for redevelopment but portions of the same line crossed intersecting streets which were not closed. A third exceptional category involved lines which were moved from one location to another within the same street, either as it previously existed or as enlarged for the project. Whether the URA supports portions of C&P's claims falling in any of these exceptional categories has not been considered or decided by either the trial court or the Court of Appeals below.

The trial court, pursuant to its order directing a bifurcated trial (A 34) and in order to determine first "the issue of liability," held an initial trial and on the evidence there presented decided only the question whether C&P was entitled to relocation payments for relocation from land which had formerly been in streets but which, at the time

of the relocation had been acquired and was solely and exclusively owned by NRHA (A 4-7). The trial court did not consider or decide any other question. After concluding that the URA did not apply to any of the claims of a utility company on these facts it was unnecessary for the District Court to determine whether, under the additional circumstances of claims falling in the exceptional categories mentioned above, the particular facilities there involved also had been moved as the result of an acquisition of real estate for the project or as a direct result of a project receiving Federal financial assistance under Title I of the Housing Act of 1949 as amended, within the meaning of the URA.

The decision of the Court of Appeals was expressly limited to the question of payment for the relocation of utility lines where, as the court said,

> * * * NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude.
> * * * (674 F.2d 298, 301 (1982), A 73)

The Court made plain that it did not decide any of the questions which would be presented upon a consideration of the individual items of C&P's claims in the exceptional cases involving the removal of some facilities from land the complete and exclusive ownership of which had not been acquired by NRHA. As to these questions the Court said:

> **Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand. (*Id.*)**

At another point Petitioner's statement of the case asserts that the filing of C&P's claims "was a departure from established practice under the City franchise agreement pursuant to which relocations had been made at C&P's expense (Stipulations 10 and 11., A. 43-44), and it was the first time that any utility had claimed reimbursement from NRHA under the URA for relocation from public rights-of-way." (Petitioner's Brief, p. 5). This suggests that C&P and other utility companies have at their own expense moved utility lines from land which had formerly been occupied by City streets and thereafter acquired by NRHA for HUD-financed redevelopment projects *since the effective date of the URA* without making such claims. This fact has never been alleged or shown by any evidence or stipulation and would be denied if alleged. Petitioner's statement here suggests also that the relocations involved here and in pre-URA cases were made "pursuant to" C&P's city franchise agreement, which is certainly not true. All of the relocated utility lines dealt with by the decision of the court of appeals below were moved from land no longer subject to a public street easement so that the city no longer had any authority or control over the use of the land and the municipal franchise no longer had any application to it.

In all other respects this Respondent accepts the statement of the case made in Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

The question here presented is answered by the plain terms of the Act itself.

The URA defines the class of individuals, corporations and other "displaced persons" entitled to its benefits, and specifies the benefits to which they are entitled, in language as broad and comprehensive as the declared purpose of the

Act. The statutory language directly applicable to C&P's claims is not susceptible of any interpretation which would exclude such claims.

The Petitioner, the *amici* supporting its position and now HUD, since the latest reversal of HUD's position before the courts in this case, argue that Congress must have intended something less than the plain import of the language of Sections 4601(5) through (7)(B) and 4637, but they can point to nothing in the Act or in its legislative history which in any way supports that contention.

In respect of the expenses and losses imposed on those directly involved in dislocations of people and their activities resulting from large scale acquisitions of land for government programs, the URA requires recognition and payment of designated elements of such loss and expense as part of the cost of the program or project, to be borne by federal and state or local taxpayers as are all other costs of the public improvement, notwithstanding the fact that such costs are not recoverable under any other law.

For those who pay the cost of utility service the burden of an increase in that cost made necessary by a governmental program or project is indistinguishable from the burden imposed on those who ultimately bear the increased cost of any other business activity when it must be moved for like reason, and in both cases the people so affected have no right under any other law to be compensated for the loss and expense thus imposed on them.

The opposition to such a law and to the decision of the Court below is supported by nothing more than the political expediency of financing part of the cost of public improvements by hidden taxes in the form of increased utility rates affecting people who receive no special benefit from the

improvement. No rational or equitable justification for doing so can be suggested. The Court of Appeals correctly refused to revise and amend this Act of Congress by reading into it an exception to the unqualified language of its express terms.

ARGUMENT

I. AS APPLIED TO THE FACTS OF THIS CASE THE STATUTORY LANGUAGE LEAVES NO ROOM FOR JUDICIAL INTERPRETATION

As stated in HUD's Brief in Opposition to the Petition for Certiorari "the court of appeals cannot be said to have erred in following the Act's plain language" (Fed. Resp. Br. in Opp. 7).

The Act mandatorily requires reimbursement of the relocation expenses and losses, and provision of the other relocation benefits specified in Subchapter II, to all "persons displaced as a result of Federal and federally assisted programs" (§ 4621). By providing that "person" means not only an individual but "any partnership, corporation or association" (§ 4601(5)) the Act makes plain that the people entitled to its benefits are not only those individuals who are themselves displaced and must bear alone the cost of moving but also all of the people who together share the cost so imposed on a displaced corporation or other organization, large or small. The Act makes equally clear that any such person is "displaced" if that "person" moves * * * or moves his personal property from real property as a result of the acquisition of such real property * * * for a program or project" (§ 4601(6)), or if that "person" "moves or discontinues his business, or moves other personal property * * * as a direct result of any project or program which receives Federal assistance under Title I of

the Housing Act of 1949, as amended" (§ 4637). And finally the Act makes plain that in referring to the moving or discontinuance of a "business" it does not mean the displaced person's total business operation but "any lawful activity * * * conducted primarily for" one of several enumerated purposes specifically including "the sale of services to the public" (§ 4601(7)).

To every such "person" the Act requires payment for "(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property; (2) actual direct loss of tangible personal property as a result of discontinuing a business or farm operation * * * (§ 4622(a)(1)-(2)).

The language of these provisions is in no way capable of being read as having two or more possible meanings, as was true of the patently ambiguous language of the "written order clause" of which this Court said:

> "the statutory language is susceptible of either construction" *Alexander* v. *Dept. of HUD*, 441 U.S. 39, 49 (1979).

A. C&P Moved From Land Acquired for a Project; It Also Moved Its Personal Property and Discontinued and Moved a Business Operation From That Land

HUD's brief argues that the telephone cables removed from the land acquired were not "moved" within the meaning of §§ 4601 and 4622 because they were not used as part of the relocated lines but used to recover their salvage value and so reduce the cost of the move. Under this view of the law any displaced person in such circumstances would be eligible for relocation payments only if he deliberately wasted the salvage value of property not suitable for use in the location to which he moves and claimed the

payments required by § 4622(a)(2). The language of the Act nowhere suggests, and no conceivable legislative policy could possibly justify, any such interpretation of these provisions.

HUD argues also that C&P did not itself move from the land acquired, mistakenly stating at page 31 of its brief that "C&P does not suggest that it has moved itself." C&P not only suggests but insists that it did so. The reference in § 4601 to "any person who * * * moves from real property" and in § 4622(a)(1) to reimbursement for "expenses in moving himself," are part of an act which defines "person" as including any partnership, corporation or association. From these two sections read together the conclusion is inescapable that an organization which discontinues a business or nonprofit activity on the land acquired and re-establishes it elsewhere is a "person who * * * moves from" such real estate and must be paid for the cost of "moving himself, his * * * business, farm operation or other personal property" under § 4622(a)(1).

Petitioner's contention that most of C&P's facilities were not personal property but real estate is separately discussed *infra* pages 9 *et seq.* In addition to this Petitioner argues that C&P should not be regarded as having moved or moved its facilities because it was able to relocate its lines in other public streets. From this Petitioner argues that relocation benefits under the URA are no more available than if C&P had merely been required to relocate its lines within existing streets which continued to be public streets, as in the case of *Consumer Product Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980), to which the URA could not be applied because there was no acquisition of real estate for the project and where the program or project did not receive Federal assistance under the Housing Act of 1949.

Petitioner's argument here would lead to a totally impossible interpretation of §§ 4601 and 4622. It only happens to be true that in this case the Federally assisted project was one in which the acquisition of land formerly available for delivery of utility services was accompanied by the creation or continuation of other streets usable for the same purpose. Application of the URA to claims like those of C&P must be the same whether this happens to be true or, on the contrary, the program or project involves the acquisition of a large tract from which all public streets and highways are eliminated, as in the case of a large military establishment, so that utility lines built in former streets must be moved to any available new rights-of-way on either public or private property. The fact that C&P here was able to move to other streets is totally irrelevant to any possible construction of the URA.

B. All of the Facilities Moved by C&P or Lost When C&P Discontinued Operation of Them Were Tangible Personal Property of C&P

It is not the law of Virginia or of any other state that utility lines built in public streets are real property. The materials used to construct such facilities in the streets were undeniably tangible personal property when they were brought to the construction site. The question whether such facilities continue to be personal property or become real property when constructed upon or physically affixed to the land is governed by the fundamental rule of property law clearly stated by the Virginia Supreme Court in *Transco Corp.* v. *Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970), hereinafter discussed, and by the Supreme Court of Maine in deciding a case which directly involved the precise question raised by the Petitioner here and

squarely held that such facilities remain the tangible personal property of the utility company.

In *Bangor-Hydro Electric Company* v. *Johnson*, 226 A.2d 371 (Me. 1967), the court held that electric power lines and telephone lines built in public streets by utility companies pursuant to their respective franchises remained personal property the sale of which was subject to a sales tax imposed on sales of personal property only. In doing so the court said:

> The test to determine whether personal property becomes part of real estate by accession, composed from Maine case law may be expressed as follows: Except in cases of trespass * * * *a chattel is not merged in the realty, unless* (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to the use to which the land to which it is annexed is put, or the chattel and the real estate are united in the prosecution of a common enterprise, *and* (3) *it was so annexed with the intention on the part of the person making the annexation to make it a permanent accession to the realty*, . . . which intention is not the hidden secret intention of the party making the annexation, but the intention which the law deduces from such external facts as the structure and mode of attachment, the purpose and use for which the annexation has been made and the relation and use of the party making it. . . .
>
> Applying this test, we find nothing in this report sufficient to persuade a finder of fact that the reference utility poles became part of the real estate by accession. They remain tangible personal property and come within the purview of the [sales and use tax] "Act."

(228 A.2d at p. 378. Emphasis supplied.)

In view of Petitioner's reliance on the fact that C&P's facilities were once treated as real property for local property tax purposes the decision in *Bangor-Hydro* is peculiarly significant by reason of the fact that for purposes of local property taxes the utility lines involved in that case were classified and taxed as real property. An Act of the Maine legislature dealing generally with local real estate taxes and other taxes on property expressly declared that "real estate, for the purposes of taxation, shall include . . . lines of electric light and power companies." The court held, however, that this provision should be construed as treating the utility lines as real property only for purposes of local property taxes.

The status as personal property of utility lines installed in a public street under a franchise has been questioned in one other reported case, and there again it was squarely held that telephone facilities of precisely the kind involved in this case are tangible personal property of the telephone company and did not become part of the real estate on which they were constructed or installed. In *United Electric Light Co.* v. *Deliso Const. Co.*, 187 Mass. 500, 52 N.E.2d 553 (1943), the plaintiff telephone Company had installed its underground conduits and cables in a public street and the defendant construction company, under contract with the city, had built a sewer beneath the telephone lines. The contractor had forced into the soil surrounding the sewer a liquid material which would harden to protect the sewer. Some of this material found its way into the telephone company's conduits, effectually destroying them. In the telephone company's suit against the contractor for this damage to the telephone lines the telephone company failed to prove that the contractor had been guilty of any negligence

and under Massachusetts law was limited to a claim of trespass by direct invasion of the plaintiff's property. In sustaining the trespass claim the Massachusetts court said:

> The plaintiff's manholes and conduits could be found to have been lawfully laid in the public way in accordance with permits duly granted in 1900 and 1921 by the proper municipal authorities to whom that power had been granted by Rev. Laws, c. 122, §2, G.L. c. 166, 22. . . . The plaintiff by virtue of the permits secured the privilege of sharing in a common right, the enjoyment of which was in the public at large, and the participation in this common right by the plaintiff by constructing and maintaining its structures for the use of the public, or that portion thereof that desired to use the facilities furnished by the plaintiff, did not impose an additional servitude upon the way for it was a use of the way that was included within the purposes for which it was taken, laid out and constructed. The rights of the owners of the lands abutting the way, although they owned the fee, were not impaired by the installation and maintenance of this underground system. [Citing authorities.]
>
> The permits did not give the plaintiff any title or proprietary interest in that part of the way that was occupied by its structures, and if the city acting under the power of eminent domain changed the grade of the way or even discontinued it, the plaintiff would have no claim for damages, even if it sustained a loss of these structures which could not be removed without destroying them. [Citing authorities.]
>
> The plaintiff, although without any proprietary interest in the land, and notwithstanding its allegation that the manholes and conduits constituted 'the plaintiff's close,' was the owner of the equipment which it had installed in the way. *This equipment did not become a part of the realty but was the personal property of the plaintiff* which remained in its custody and pos-

session. . . . (52 N.E.2d at pp. 555-6. Emphasis supplied.)

Nothing inconsistent with this view of the law is to be found in any decision of the Supreme Court of Virginia. In *Transco Corp.* v. *Prince William County,* 210 Va. 550, 172 S.E.2d 757 (1970), the gas mains held to have become real estate had been installed by the pipeline company on land which it owned outright or in which it owned a permanent right to use the land for the continued maintenance and operation of its lines—a right which is itself real property—an interest in the land itself for which it would be entitled to just compensation in the event of any taking of this land for public use. For this stated reason, and on precisely the same principles on which the Maine and Massachusetts cases held that utility lines in streets are personal property, the Virginia court held that Transco's lines had become part of the real estate:

> Three general tests are applied in order to determine whether an item of personal property placed upon realty becomes itself realty. They are: (1) annexation of the property to the realty, (2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and (3) the intention of the parties. *The intention of the party making the annexation is the chief test to be considered* in determining whether the chattel has been converted into a fixture. *Danville Holding Corp.* v. *Clement,* 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941); *Green* v. *Phillips,* 67 Va. (25 Gratt.) 752, 759 (1875).
>
> * * *
>
> In the present case the evidence shows that Transco's gas mains are buried in the ground, and thus annexed to the realty. The mains are adapted to the use

> of the property to which they are annexed, and *they are essential to the purpose for which the perpetual easements were acquired and are used.* Testimony that the gas mains could be used for a hundred years, because of the methods employed by Transco to preserve and protect them, clearly indicates that it was Transco's intention to permanently annex them *to the land in which it has perpetual rights of way and easements. * * * Thus it was clearly the intent of Transco to make the gas mains a part of the realty.* (210 Va. at pp. 555-6. Emphasis supplied.)

An exactly opposite intention being equally if not more apparent when a telephone company installs its lines in public streets, where the company has no property interest in the real estate and no permanent right of any continued use of it, the Virginia court could not, consistently with the entire rationale of its decision in *Transco,* do otherwise than follow the decisions of other courts in cases such as *Bangor-Hydro* and *United Electric Light Co.*

Petitioner relies upon the fact that in 1972 counsel for the Company successfully claimed that the decision in *Transco* v. *Prince William* required classifying all of C&P's lines, whether on its own land or easements or in the streets, as real property for purposes of local property taxes in Norfolk, where the real property tax rate was lower than the tangible personal property tax rate. In accepting this view of the law, both C&P's attorney and the Commissioner of the Revenue ignored the fact that some of C&P's lines were in public streets. Also they may have been understandably misled by the fact that Virginia statutory and constitutional provisions dealing with property taxes use the terms "tangible personal property," "personal property tangible in fact," "intangible personal property" and "real property" in a highly specialized technical sense, in that

property which as a matter of property law clearly belongs to one of these kinds may be classified by the legislature and taxed as property which for all other purposes quite as clearly belongs to another of these classes. This has been the settled law of Virginia since the decision in *Roanoke* v. *Michael's Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942), upholding the right of the state to tax as "intangible personal property" the delivery trucks of a manufacturing company notwithstanding the constitutional provision that "no State property tax for State purposes shall be levied on real estate or tangible personal property" and the further constitutional mandate that "Real state and tangible personal property . . . are hereby segregated for, and made subject to, local taxation only. . . ." (Constitution of Virginia § 171.) Since the time of the Michael Bakery decision it has been clear that § 168 of the Constitution, providing that "The General Assembly may define and classify taxable subjects," permits the legislature to classify property belonging to one of these kinds as belonging to another for property tax purposes. This alone can explain the fact that, as C&P's letter to the Commissioner of the Revenue reflects, the City had always taxed as real property the station equipment of the company (telephone instruments and other equipment which the company leases to its customers) in spite of the fact that such equipment was in fact tangible personal property for all other purposes. (A 292-3, A 158-9.)

It is therefore clear that the telephone equipment moved by C&P or lost when operation of it was discontinued was tangible personal property within the meaning of that term as used in the URA and as universally understood in the law of property.

C. C&P's Displacement Was a Result of NRHA's Acquisition of the Land Occupied By C&P's Equipment and a Direct Result of Projects Under Title I of the Housing Act of 1949

Petitioner's brief correctly states that its "acquisition of the land in which C&P had installed its facilities was accomplished *bit by bit*" (Pet'r's Br. 37), by first acquiring the abutting landowner's title and then procuring adoption of ordinances extinguishing the public street easement. After this acquisition had been completed NRHA alone, and neither the State, the City, nor any private person could either permit or forbid continued use of the land to deliver utility service to the public. Thus, NRHA alone granted such permission in the case of the electric power line described in Exhibit No. 33 (A 295), and withheld it in the case of C&P's facilities (Stipulation, A 45).

It is therefore not only "arguable," as HUD's brief concedes, but undeniable that C&P's move was a result of the land acquisition. It is equally undeniable that it was a direct result of urban renewal projects as specified in § 4637.

D. C&P Claims Payment For Only Those Expenses and Losses For Which Payments Are Specifically Required By § 4622(a)(1)-(2)

HUD's brief at page 42 states that "it is difficult to be certain what the $686,422.53 claim tendered by respondent encompasses" and that "It appears, however, that this sum represents primarily the cost to respondent of constructing its substitute lines." This statement seriously misdescribes C&P's written claims, which have been delivered to and reviewed by HUD and from which HUD's Regional Office has determined that

> "although we have not conducted an exhaustive engineering review of line items claimed * * * it appears that the expenses have been properly incurred, accounted and presented." (A 266)

Because of the bifurcated trial the written claims are not part of the record in this case but HUD and the Solicitor General appearing for it cannot now deny that all of C&P's claims are either (1) for the actual cost of moving equipment *less credits for its salvage value* or (2) for the cost of rebuilding relocated facilities *less credit for the previously realized value, represented by the previously expired portion of its useful life, of the old facilities abandoned, and less a further credit for "betterments" where the new facilities built are larger or involve greater expense than duplicating the old ones.*

C&P's claims are thus strictly confined to the payments required by § 4622(a)(1)-(2).

E. The Absence of Specific Reference to Utility Relocation is Not Significant

Consistently with its broad purpose the Act carefully defines the class of "displaced persons" entitled to its benefits in comprehensive terms which include innumerable distinct categories of such persons not specifically mentioned.

Undoubtedly the largest single category of displaced persons intended to be protected and included in the statutory definition consists of the displaced tenants of rented property who have to move because their short term leases expire between the time when the lessor's interest is acquired and the time when they are evicted. The operative provisions of the Act requiring reimbursement of the moving expenses of any displaced persons nowhere mention

holdover tenants or tenants at will or by sufferance, and throughout the entire subchapter providing for relocation benefits of all kinds the word "tenant" is never used in the text of the Act. That word is to be found only in the caption of 42 U.S.C. § 4624, affording special benefits, in addition to reimbursement of moving expense, to persons displaced from dwellings which they do not own but have occupied for ninety days or more before the acquiring agency first moved to acquire the property. In most cases such persons undoubtedly will be tenants occupying the property under a lease, but the text of this section makes it equally applicable to every "displaced person," as previously defined by 42 U.S.C. § 4601, who has "actually and lawfully occupied" such a dwelling for at least ninety days before the commencement of negotiations for its purchase, whether under a lease, by revocable permission of the owner or as squatters under an invalid claim of some right to do so.

After defining "displaced person" as including any corporation, partnership or association affected in the manner specified by the other terms of the definition the Act does not specifically mention any of the infinitely varying kinds of relocation which may result when a company must move its business operation or its movable property from land acquired for a government project or from other land as the result of a government acquisition of land on which the company conducts a business operation. It does not, for example, mention relocation of a telephone company's central office equipment from leased premises after acquisition of the office building for a government project, in which case Petitioner necessarily admits that the URA would require reimbursement for its relocation costs (Petitioner's Brief 24).

Nor does the Act mention relocation of a chain saw manufacturer's plant from land not acquired for the project resulting from acquisition of other land held by the company for plant expansion, as in the case of *Beaird-Poulan Division, etc.* v. *Department of Highways,* 616 F.2d 255 (5th Cir. 1980), cert. den. 449 U.S. 971 (1980), rehearing denied 449 U.S. 1104 (1981) and it does not mention the relocation of billboards constructed by an outdoor advertising company on land acquired for a highway improvement project, under agreements with the former landowner which may or may not have created any leasehold or other property interest in the signboard company, as in the case of *Whitman* v. *State Highway Commission of Missouri,* 400 F.Supp. 1050 (W.D. Mo. 1975).

Most if not all of the relocations for which reimbursement is required, and most if not all of the individuals, corporations, partnerships and associations plainly intended to be benefitted, are mentioned in the Act only by use of the broad but wholly unambiguous language of 42 U.S.C. § 4601 defining "person" and "displaced person." Denial of its application to relocations of persons or businesses of any one kind can never be justified by the absence of any specific mention of it in the Act.

II. NOT ONLY THE WORDS OF THE URA BUT A CLEAR CONGRESSIONAL POLICY UNDERLYING OTHER ACTS OF CONGRESS REQUIRE APPLICATION OF THE URA TO RELOCATIONS OF UTILITY LINES BUILT IN STREETS

In other legislation dealing directly with the special burden imposed on utility companies and their customers when utility lines built in streets or highways must be relocated as the result of federally financed programs Congress has

done literally everything within its power to provide for reimbursement of the relocation cost as part of the cost of the project.

In Section 123 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 123, Congress dealt with relocations of utility lines for construction of Federal-Aid Highways and provided for payment of the cost of moving such lines as part of the cost of the project unless such payment "violates the law of the State or violates a legal contract between the utility and the State" (*Id.*) To the extent of the Federal share, which in the case of interstate highway projects was 90% of the project cost, Congress thus recognized and afforded relief against the inequity of imposing on utility ratepayers this part of the cost of a national highway system.

When this legislation was enacted neither the URA nor Chapter 5 of the Federal-Aid Highway Act, both dealing with displacement by acquisitions of land for a project, was in effect. When the URA superseded and repealed Chapter 5 of the Highway Act, § 123 was left in force, reaffirming the Congressional policy of affording such relief to utility companies and their customers regardless of whether the displacement results from a land acquisition.

In the District of Columbia Public Utilities Reimbursement Act of 1972, P.L. 94-495, Congress specifically required reimbursement of those who move utility lines for either Federal-Aid highway projects or urban redevelopment projects in the District of Columbia, whether from land acquired for the highway or redevelopment project or within an existing street being rebuilt as part of the Federal-Aid Highway System or as part of a redevelopment plan.

From the fact that some of these District of Columbia relocations would be the result of an acquisition of land for the project Petitioner and HUD argue that Congress did

not consider the URA to be applicable to any of them. They do not explain how the same legislative body could intend to treat differently utility companies and their customers so affected by urban renewal or highway projects in the District of Columbia and others identically affected by similar projects elsewhere. There can be no rational basis for asserting that Congress has adopted one Congressional policy for those who support the cost of utility services delivered through streets of the District of Columbia and an exactly opposite policy for those who support such systems elsewhere.

The legislative policy of these two other Acts of Congress is irreconcilable with anything other than the plain import of the broad language of the URA.

III. THE URA SEEKS TO REMEDY BOTH THE INEQUITIES AND THE LACK OF UNIFORMITY IN THE TREATMENT OF DISPLACED PERSONS. FOR THOSE WHO PAY THE COST OF UTILITY SERVICES THE EFFECT OF GOVERNMENT PROGRAMS WAS AS LACKING IN UNIFORMITY AS IT WAS INEQUITABLE

Before enactment of the URA federal programs requiring utility relocations had widely varying effects throughout the nation on consumers of utility services delivered through public streets and highways, the entire cost of such relocations being imposed on some of them and none of it on others identically affected by such programs.

Wholly disparate treatment of people similarly situated resulted from differences in state law from one state to another, from federal and state legislation dealing only with programs of particular kinds and from administrative practices according one treatment to the consumers who pay with their utility bills the cost of a system owned and op-

erated by a public service corporation and an opposite treatment to those who similarly support an identical system owned and operated by a municipality or other public agency. Such disparity sometimes resulted from municipal ordinances and policies of some cities diametrically opposed to those in others.

The inequity of imposing on utility ratepayers part of the cost of a program from which they receive no benefit other than the benefit to the whole public, for which they pay their proper share in taxes, has been recognized and corrected by state law in at least seven states.

In Michigan, Vermont and Rhode Island state statutes which, like the URA, nowhere specifically mention payment for relocating utility lines built in streets but provide in general terms for the execution of urban renewal projects, are construed as requiring such payment wherever utility lines are relocated for such a project. *In Re City of Center Line,* 387 Mich. 260, 196 N.W. 2d 144 (1972); *Vermont Gas Systems, Inc.* v. *City of Burlington,* 130 Ve. 75, 286 A 2d 275 (1971); *Newport Electric Corp.* v. *Redevelopment Agency of Newport,* 116 R.I. 22, 351 A 2d 590 (1976). In Tennessee and Kansas state statutes expressly require payment for relocations of utility lines built in streets when required for urban renewal projects. *South Central Bell Tel. Co.* v. *City of Chattanooga,* 518 S.W. 2d 950 (Tenn. app. 1978); *Missouri Pacific R. Co.* v. *City of Topeka,* 213 Kan. 658, 518 P. 2d 372 (1974). In Indiana a statute which in terms merely authorizes payment for such relocations is held to entitle the utility company to demand it. *City of Columbus* v. *Indiana Bell Tel. Co.,* 152 Ind. App. 22, 281 N.E. 2d 510 (1972). And in Arkansas the common law rule generally treating such relocation costs as part of the cost of utility service is not followed except in a

narrow class of cases. *Southwestern Bell Tel. Co.* v. *City of Fayetteville*, 271 Ark. 630, 609 S.W. 914 (1980).

Ratepayers receiving utility service from systems owned and operated by public agencies are exempt from utility relocation costs by the rules and practices of HUD in administering urban renewal programs (paragraph 9 of Stipulation, A 43). Those served by utility lines moved from streets in the District of Columbia, whether as the result of land acquisition or solely as the result of reconstruction of streets in redevelopment project areas, are similarly exempted by the District of Columbia Public Utilities Reimbursement Act of 1972, *supra*, and those served by systems relocated for interstate highway projects are exempted in the sixteen states which have taken advantage of Section 123 of the Federal-Aid Highway Act, *supra*.

In the City of Baltimore a municipal ordinance authorizes, and is held by the Supreme Court of Maryland to require, payment by the redevelopment agency for moving utility lines in the execution of urban renewal projects, *Mayor and City Council of Baltimore* v. *Baltimore Gas and Electric Co.*, 221 Md. 94, 156 A 2d 447 (1959), and in Richmond, Virginia a general ordinance precludes the closing of any street occupied by utility lines at the request of either a private citizen or a governmental agency unless the cost of any resulting utility relocation is paid by the person or public agency requesting that the street be closed.[1]

[1] Unless otherwise specifically provided, whenever any street, alley or other public way is vacated or abandoned by the city at the request of any private individual, association, corporation or public authority, the cost of the relocation or removal of public utility facilities located in such street, alley or other public way shall be paid by the private individual, association, corporation or public authority requesting such vacation or abandonment. (Code of the City of Richmond §27-25)

The absence of a nationally "uniform policy for fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs" was nowhere more conspicuous than in the cases of those who "suffer disproportionate injuries" by having to pay the cost of moving utility lines "as a result of programs designed for the benefit of the public as a whole."

IV. THE URA DOES NOT ABROGATE THE COMMON LAW RULE. IT ONLY PROVIDES FOR MITIGATION OF INEQUITIES WHICH RESULT WHEN THE RULE IS APPLIED TO A SINGLE CLASS OF SITUATIONS NEVER CONTEMPLATED WHEN THE RULE WAS BEING FORMULATED

The common law rule established in the landmark case of *New Orleans Gaslight Company* v. *Drainage Commission,* 197 U.S. 453 (1905) and widely followed in cases like *Sanitation Commission* v. *Chesapeake,* 218 Va. 698, 240 S.E. 2d 819 (1978), was developed in cases which involved utility line relocations for public improvements of the kind normally undertaken and financed by state and local governments, usually for the benefit of the same people served by the utility system affected.

This common law rule is equally applicable whether the change in the use of the public right-of-way is made by rebuilding the roadway for the benefit of the traveling public, or by making it more useful for other street uses, such as the delivery of other utility services. but both the primarily intended and the most widespread application of the rule assuredly has been to prevent interference with local improvements undertaken by local governments.

For all such cases the URA in no way changes the effect of the common law rule. The URA requires reimbursement

for the cost of such relocations only when the relocation is made necessary by federally sponsored and financed programs undertaken to serve national needs or local needs pervasive throughout the nation, and in no way does the URA impair the authority of any state or local government to require that utility lines built in public streets be rearranged or removed for the public good, or otherwise to regulate and control the use of land dedicated to public use.

It is true that the rule has been extended to cases in which the relocation results from an exercise of the power to acquire property and thereafter accomplish governmental objectives by exercising the proprietary rights of a landowner rather than by an exercise of purely regulatory powers, but this is an exceptional application of the rule not originally or primarily contemplated when the rule was being developed. The URA has only provided relief against some of the unjust and anomalous consequences of its application to this comparatively new class of cases arising out of the massive use of federal funds to finance national programs.

V. THE QUESTION DECIDED BY THE COURT OF APPEALS HAS BEEN OTHERWISE DECIDED IN ONLY ONE CALIFORNIA INTERMEDIATE APPELLATE COURT, ONE IDAHO TRIAL COURT AND THE DISTRICT COURT BELOW, ALL ON MISTAKEN GROUNDS

Petitioner's brief states that "all of the other courts which have considered the question" decided by the Court of Appeals below have decided it differently (Petitioner's Brief 13). Besides the District Court below there are just two such other courts, the California Court of Appeals for Division 5 of the Second District of California in *Pacific Tel. & Tel. Co.* v. *Redevelopment Agency of Glendale*, 87 Cal.

App. 3d 296, 151 Cal. Rpt. (1978) and the District Court for the Fourth District of Idaho in the unreported case of *Mountain States Tel. and Tel. Co.* v. *Boise Redevelopment Agency* (1980), from which the local judge's Memorandum Decision is reproduced in an appendix to the Petition for Certiorari (Appendix to Petition C-1).

The District Court below reasoned that Congress could not have intended to protect utility companies because they "retrieve their operating costs and the reasonable return of their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses" (A 57-8). The relevant competing interests here are not the interests of public service corporations against those of municipal corporations, but the interests of the Federal and local taxpayers for whose benefit Federal programs are designed against the interests of utility ratepayers who rarely if ever derive any special benefit from those programs. Furthermore the district court thus reached the conclusion that a utility company can never be a "displaced person" entitled to reimbursement of moving costs because they are recoverable from its customers—a conclusion which Petitioner admits is incorrect, conceding (Petitioner's Brief 24) that a telephone company moving its central office equipment for a redevelopment project is a "displaced person" entitled to reimbursement of its relocation costs notwithstanding the fact that such costs are equally recoverable from its customers if not reimbursed.

The District Court also overlooked the fact that the members of "the general public" from whom utility companies "retrieve their operating costs and the reasonable return of their investment" are usually (in this case 93% of C&P's customers) not within the franchise area of the city benefitted by the federally assisted project.

The California court in *Glendale* and the Idaho court which followed it in *Boise* reason from the insupportable premise that broad general provisions of an Act which undoubtedly changed the common law rule which everywhere requires owners and tenants of land acquired for public use to move their personal property and their business at their own expense should not be deemed to change similarly the common law rule which in many but not all states requires utility companies and their customers to bear the expense of moving utility lines built in streets. From this premise the California court reasoned that "an intent to exempt utilities from the common law *cannot be inferred from* the broad general definitions used in the relocations assistance law." (151 Cal. Rptr. at 70 Emphasis supplied). This reasoning ignores the fact that utility companies are included in the meaning of "displaced person" not be any mere inference but by the broad scope of the plain terms of the Act.

In addition to these decisions in *Glendale* and *Boise* Petitioner cites *Artesian Water Co.* v. *State Dep't. of Highways and Transportation*, 330 A 2d 432 (Del. Super. 1974) aff'd 330 A 2d 441 (Del. 1974), the unreported case of *Lone Star Gas Co.* v. *Landrieu*, No. 80-100C, (E.D. Okla. 1981), the judgment order in which is set out in the Joint Appendix (A319-332), and the unreported case of *National Fuel Gas Distribution Corp.* v. *Niagra Frontier Transp. Auth.* Civil no. 78-843 (W.D.N.Y. 1980) as being among the decisions of "those other courts which have construed the URA in circumstances similar to the case at bar" and held it to be inapplicable. (Petitioner's Brief 14-15) These cases did not involve or decide the question presented in the case at bar.

In *Artesian* there was no acquisition of real estate for the project and the water company could not and did not claim to be a displaced person" as defined in the URA. Its claim was based solely upon a Delaware statute, 17 Del. C. § 132 (b) (5), designed to take partial advantage of § 123 of the Federal-Aid Highway Act. This state law in terms authorized payment of the state's share of utility relocations costs only in cases where the Federal contribution paid 90% of the project cost, which was not true in this case. *Artesian* unsuccessfully argued that the subsequent enactment of a Delaware URA essentially like the Federal Act indicated a legislative policy to reimburse the full relocation cost in all cases, and should be given the effect of amending 17 Del. C. § 132 (b) (5) by repealing this limitation. *Artesian* in no way involved or even touched upon the claim of any "person who * * * moves * * * or moves his personal property from real estate as a result of the acquisition of such real property" for a Federally assisted project, or who moved as a result of a project receiving assistance under Title I of the Housing Act of 1949.

The decision in *Lone Star* likewise involved no acquisition of real estate for the project and the District Court based its decision squarely on this fact:

> **Fifth Street was being widened and paved. The street was already owned by the City. No land or easement was acquired by the City for their improvement. * * * (A322)**

Petitioner cites *National Fuel Gas* without anywhere indicating what were the facts or the nature of the District Court's decision in that case. We are informed by counsel for New York Telephone Company in this case that the utility companies utlimately prevailed in this litigation.

VI. CONDITIONS AND LIMITATIONS OF MUNICIPAL FRANCHISE AGREEMENTS HAVE NO BEARING HERE

Franchise ordinances and agreements merely implement a delegated governmental power to regulate the use of land dedicated to public uses. They are not the primary source of either the right to use streets for delivery of utility service or the obligation to move when required in the public interest.

The primary source of the right to use the land in a public street to deliver utility service is the dedication of the land for street use, which in urban areas must include delivery of utility service if the public is to be served by utilities.

> The character of the business of such companies was well known. Access with their lines to the houses of their customers in the city absolutely required the right to use the public streets, either longitudinally or to cross them. By such an exertion of its power to control and regulate the use of the streets it did not authorize a new public use. Such a use was a legitimate street use and did not impose upon the owner of the fee in the street an additional burden. * * * *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 68 (1915).

Municipalities do not own the city streets.

> It is well settled that public highways, whether they be in the country or in a city, belong not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature. * * * (*Richmond* v. *Smith*, 101 Va. 161, 166, 43 S.E. 345 (1903)).

A city has neither any proprietary interest in the streets within its corporate limits nor any authority over them

except that which is expressly conferred on the city through a delegation of the State's police power to regulate and control the use of land dedicated to public use.

> The original source of power over both streets and highways is the State. But this power of control is generally delegated in some form to the municipalities and county authorities of the State. Thus the county fiscal courts, by §4306, Kentucky Statutes, are given 'general charge and supervision of the public roads,' etc. * * * (*Owensboro* v. *Cumberland Tel. & Tel. Co., supra,* 230 U.S. at 66).
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> It is fundamental that streets and highways belong to the public. Subject only to the limitation that constitutional rights must not be invaded, supreme control over the streets and highways is vested in the state, which, acting under its police power and through the legislature, may prescribe reasonable restrictions and regulations for their use. *Norfolk & Portsmouth Tract. Co.* v. *Norfolk,* 115 Va. 169, 177, 78 S.E. 545, 547; *Ferguson* v. *Board of Supervisors,* 133 Va. 561, 566, 113 S.E. 860, 861.
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> This power of the state over streets and highways may lawfully be delegated to local governing bodies, and when so delegated, may be exercised by such bodies to the full extent of the power conferred. *City of Lynchburg* v. *Peters,* 145 Va. 1, 9, 10, 133 S.E. 674, 677. (*Funeral Directors' Ass'n.* v. *Groth,* 202 Va. 792, S.E.2d (1961)).

Thus a municipal franchise ordinance which attempts to bind the municipality to make street repairs of a kind which are required of the street railway company by an Act of the state legislature granting its corporate charter is beyond the power of the city government and invalid. *Norfolk & P. Co.* v. *Norfolk,* 115 Va. 169, 78 S.E. 545 (1913). In so holding the court said:

In *City of Reading* v. *United Traction Company*, 215 Pa. St. 250, 380, 64 Atl. 446, 7 Ann. Cas. 380 (see also notes to the principal case), it was held that a street railway company, in the absence of express contract or statutory direction, is bound to keep the portions of the streets occupied by its right of way in proper repair. The court also observes: 'That the streets of a city belong to the State for the use of the people at large. To the municipality, as its agent, it commits the duty of at all times keeping them in proper repair for the convenience and safety of the public. This duty of the municipality does not shift, except when it is expressly or impliedly imposed upon another.' *City of Richmond* v. *Smith*, 101 Va. 161, 43 S.E. 345; *Bellenot* v. *City of Richmond*, 108 Va. 314, 61 S.E. 785; *White Oak Coal Co.* v. *City of Manchester*, 109 Va. 749, 64 S.E. 944, 132 Am. St. Rep. 943.

These principles are grounded upon the general proposition that the legislature, subject only to constitutional limitation, has supreme control over streets and highways; while, on the other hand, the power of a municipality is wholly dependent upon and measured by delegation from the government, and is held and exercised in subordination to its will. The one exerts sovereign power, the other granted power, and holds its streets as trustee for the general public. (115 Va. at 177).

And since the authority over streets delegated to municipalities is a purely governmental power and not a proprietary right a city cannot validly contract with a redevelopment and housing authority to close streets to be selected by the authority for inclusion in the land acquired by it. *Mumpower* v. *Housing Authority*, 176 Va. 426, 115 F.2d 732 (1940).

Nor can a city authorize the fencing in of part of a street for use as a fairground. *Chambers* v. *Roanoke I. Ass'n,* 111 Va. 254, 685 E. 980 (1910).

City governments can and do grant or withhold permission for a particular utility company to use the streets, prescribe or control the manner and location in which its facilities may be installed in the streets and impose other conditions for protection of the public, but in doing so they only exercise a regulatory power delegated by the state. Such power does not include authority to interdict the enactment of state or federal legislation requiring reimbursement for the cost of such relocations. Limitations on the privilege granted by municipal franchise agreements have no bearing on the question here presented.

A. Legislation Requiring Reimbursement of Relocation Costs Could Not Unconstitutionally Impair Any Contractual Obligation of C&P to Relocate at its Own Expense Since C&P's Franchise Imposed No Such Obligation

The ordinance granting C&P's franchise (A228-243) nowhere mentions removal or relocation of the company's facilities except to accommodate construction of city sewer and water lines (A236-7).

Petitioner and HUD rely on the fact that "the City has reserved the right to amend, alter or repeal the ordinance at its pleasure without providing compensation for any damage which might result (A240-241)" (Petitioner's Brief pg. 9; HUD's Br. 23).

It is well-settled that such provisions have no effect upon any of the contractual rights and obligations created by a franchise ordinance. As said in *Owensboro* v. *Cumberland Tel. & Tel. Co., supra.*

The sixth section of the granting ordinance provides that, 'This ordinance may be altered or amended as the necessities of the city may demand.' This is no more than a reservation of the police control of the streets and of the mode and manner of placing and maintaining the poles and wires incident to the unabridgeable police power of the city. *See Grand Trunk Railway* v. *South Bend,* 227 U.S. 544. It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted. Nor does the city attempt to justify its action in requiring the poles and wires to be removed from the streets under that section, but solely upon the general power in the city charter 'to make, publish and repeal ordinances.' This general power to repeal ordinances obviously refers to ordinances which are legislative in character, and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. *Baltimore* v. *Baltimore Trust Co.,* 166 U.S. 673; *Grand Trunk Railway* v. *South Bend, supra. The power to repeal, alter and amend such ordinances is one which inheres in the power to legislate, and its mention is pure supplusage.* (230 U.S. at 72-73 Emphasis supplied).

VII. IF THE COST OF RELOCATING UTILITY LINES BUILT IN STREETS IS NOT REIMBURSABLE UNDER §4622 (A) SUCH FACILITIES MUST BE ACQUIRED WITH THE LAND UNDER §4652 WITH ANOMOLOUS CONSEQUENCES

. 42 U.S.C. §4652, in Subchapter II of the Act establishing real property acquisition policies, appears to be directed primarily to the typical "ground lease" situation, such as the familiar case in which an industrial owner assembles vacant land for long-term control over its ultimate development and to insure its ultimate availability, and in the meanwhile permits it to be improved and developed by a tenant

who must remove or surrender his improvements upon the expiration or other termination of the lease. Nevertheless both its terms and its plain purpose include every case in which a person other than the landowner, who is a tenant in the broad sense of one who wholly or partially occupies the land, has been permitted to install buildings, structures or improvements without a right to keep them there indefinitely. The plain terms of §4652 require that any acquisition of such land for a government project, or of any interest or estate in that land, must be accompanied by an acquisition of such buildings, structures or improvements, so that the owner of them will not be forced to contribute to the project the use of these improvements which he would have enjoyed had the program or project not been undertaken.

This section carefully provides against any overlap or duplication of the payments required to be made under its provisions and any other compensation to which the owner of the improvements may be entitled under the law of eminent domain, under the relocation benefit provisions of the URA or under any other law, but just as clearly requires that if any such structures or improvements must be removed or "will be adversely affected by the use to which such real property will be put" by the acquiring agency, the improvements must be purchased or condemned with the real estate.

If the provisions of § 4622 (a) should be held inapplicable to relocations of utility lines built in streets, either under Petitioner's contention that C & P's facilities are real property for all purposes or on any other ground, it would follow that the land in the former street beds could not be acquired for redevelopment without acquiring the utility company's structures and improvements installed on that

land. This would present difficult and perplexing questions as to the proper application in such cases of the measure of compensation prescribed by § 4652, and would result in a much less appropriate method of correcting the inequitable effect of the project on utility ratepayers than the relief afforded by of §§ 4622 (a) and 4601 (6) and (7).

VIII. THE POSITION OF THE OPPOSING AMICI IS INEQUITABLE

Local governments are understandably reluctant to lose the advantage of being able to impose part of the cost of local improvements on nonresident utility ratepayers to whom they are not accountable, and the luxury of ignoring the unnecessary cost of redevelopment plans which require extensive utility relocations not essential to a proper redevelopment of the area. Unnecessary relocations are especially encouraged by HUD's indefensible policy exempting from this burden those who pay their utility bills at city hall instead of to a utility company, thus removing all incentive to avoid unnecessary relocations of utility facilities of all kinds.

Utility companies often serve a larger segment of the public than the communities benefitted by the project, as exemplified by the fact that 93% of C&P's customers are not in Norfolk (Stipulation A 37). The national government, having sponsored and financed programs which impose an unjust burden on people adversely affected in an infinite number of ways, including utility ratepayers, could not properly leave to state and local governments sole responsibility for correcting such inequities. Through the URA Congress has accepted this responsibility by establishing "a uniform policy for the fair and equitable treatment"

of all people who could otherwise bear part of the cost of dislocations caused by acquisitions of real estate for government projects.

The position of the opposing *amici curie* is supported by nothing more than the political expediency of financing part of a desired improvement through hidden taxes never recognized by those who pay them.

A. There Can Be No "Retroactive" Effect Unjustly Imposing Unbudgeted Expense On Local Agencies and No "Windfall" Or "Double Recovery" By Utility Companies

Local Governments cannot be left with the cost of such relocations. Contracts for capital grants made under 42 U.S.C. § 1453 have committed the United States to payment of the designated Federal share of net project costs, and under § 4631 (c) every such contract entered into before the effective date of the URA must be amended to include the cost of providing the relocation benefits prescribed by it. The required Federal contribution to any recovery on claims like those of C&P is no less enforceable than any other obligation of the national government.

The argument of some of the *amici* that there might be an indefinite accumulation of previously unasserted claims of this kind ignores the fact that no such claims must be paid unless filed "within eighteen months after the move is completed" (24 CFR § 42.221).

Nor could there possibly be any "windfall" or second recovery of utility relocation costs after they have been recovered from the utility company's customers. In its Brief on the Merits Petitioner apparently abandons the contention stressed in its Petition for Certiorari that payment of C&P's claims would compensate the company a second time for

costs already recovered from its customers, (Pet. for Cert. 25-6, 27-8), but some of the *amici* supporting Petitioner still so insist.

This contention, made for the first time in the Supreme Court and unsupported by any evidence whatever, could not possibly have been so supported.

Under the accounting principles applicable to C&P and most telephone companies relocation costs charged to a third party, such as the costs here charged to NRHA, are accounted for as accounts receivable. The Company's rate base and expenses for ratemaking purposes and its resulting rates are not increased. Only if it should be determined that these amounts heretofore charged to NRHA are not valid and collectible accounts receivable can they be treated as costs recoverable in the ratemaking process so that C&P's customers throughout the state will thereafter pay this part of the cost of Norfolk's urban renewal program.

CONCLUSION

The decision of the court of Appeals below was plainly right and should be affirmed.

Respectfully submitted,

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